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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ANTHONY RUIZ,

Defendant and Appellant.

2d Crim. No. B203578
(Super. Ct. No. NA072598)
(Los Angeles County)

A jury convicted David Anthony Ruiz of second robbery (Pen. Code, § 211)¹ and resisting an executive officer (§ 69), with special findings that he had suffered two prior strike convictions within the meaning of the Three Strikes Law (§§ 667, subds. (b) – (i); 1170.12, subds. (a) – (d)) and two prior serious felony convictions (§ 667, subd. (a)(1)). Appellant was sentenced to 60 years to life state prison and appeals on the ground that the jury was not properly instructed on reasonable doubt. We affirm.

Facts

On the evening of December 4, 2006, appellant came up behind Victor Sandoval in downtown Long Beach and hit him in the head four times. Appellant

¹ All statutory references are to the Penal Code.

threatened to kill him if he did not give appellant everything he had. Appellant took Sandoval's gray sweater, baseball cap, I-Pod, cell phone, and shoes.

Minutes later, Long Beach Police Detective Miguel Rosales saw appellant walking northbound on Alamitos Avenue carrying a gray sweater, a pair of shoes, and I-pod earphones. Detective Rosales stopped appellant because he matched the description of a suspect involved in a shooting. Appellant had bloodshot eyes, smelled of alcohol, and said that he was on parole.

The detective ordered appellant to drop the shoes and grabbed his hands to conduct a weapons search. Appellant tried to elbow the detective in the face and threw two punches. Detective Rosales pulled appellant to the ground and ordered him to show his hands, but appellant refused. After the detective threatened to taser him, appellant showed his hands and was handcuffed. As Detective Rosales radioed for backup, appellant got up and ran northbound down the street.

Detective David Urbina heard the radio call and chased appellant through a parking lot, down 10th street, and up a driveway. The detective drew his service revolver and ordered appellant to step off a stairwell. Appellant replied, "Fuck you, asshole."

Appellant was tasered and arrested. The detectives recovered the I-Pod, baseball cap, sweater, and shoes which were dropped during the chase. The victim, Sandoval, identified appellant as the man who hit and robbed him.

CALCRIM 220

Appellant argues that the CALCRIM 220 instruction on reasonable doubt is constitutionally inadequate and fails to clearly explain, as does former CALJIC 2.90, that guilt must be proved beyond a reasonable doubt. Appellant, however waived the instructional error by not objecting or requesting that the trial court modify the instruction. (See e.g., *People v. Stone* (2008) 160 Cal.App.4th 323, 331 [challenge to constitutionality of CALCRIM 220 forfeited by not objecting].)

Waiver aside, there is no merit to the argument that CALCRIM 220 is unconstitutional or misstates the standard of proof beyond a reasonable doubt. (§ 1096.)

CALCRIM 220 defines proof beyond a reasonable doubt as "proof that leaves you with an abiding conviction that the charge is true."² Section 1096 is phrased in the negative and defines "reasonable doubt" as "that state of the case, which . . . leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."³

Although CALCRIM 220 is more straightforward, appellant claims it obfuscates the proof beyond a reasonable doubt standard which requires "a subjective state of near certitude of the guilt of the accused [Citation.]" (*Jackson v. Virginia* (1979) 443 U.S. 307, 315 [61 L.Ed.2d 560, 571].) Appellant complains that CALCRIM 220 does not discuss the "subjective certitude" that a juror must "feel" in order to convict. Appellant asserts that the "abiding conviction" standard referred to in CALCRIM 220 is

² The CALCRIM 220 instruction stated: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

³ Section 1096 provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a merely possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. Is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.' "

not the same "abiding conviction" described by the United States Supreme Court a century ago when it defined "abiding conviction" as the level of certainty a juror "would be willing to act upon in the more weighty and important matters reflecting to your own affairs" (*Hopt v. Utah* (1887) 120 U.S. 430, 439 [30 L.Ed. 708, 711].)

We reject the argument on several grounds. First, a trial court is not required to instruct the jury in the language of section 1096. (§ 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503.) "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.]" (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [127 L.Ed.2d 583, 590].)

Appellant's challenge to CALCRIM 220 is an exercise in semantics. The phrase "abiding conviction" in CALCRIM 220 "needs no additional context or description to convey the type of personal conviction required to pronounce guilt." (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 31.) Our State Supreme Court has consistently rejected the argument that the "abiding conviction" phrase in CALJIC 2.90 is inadequate. (*People v. Cook* (2006) 39 Cal.4th 566, 601; *People v. Freeman, supra*, 8 Cal.4th at pp. 501-504.) "Those rulings apply with equal force to the language in CALCRIM No. 220. [Citation.] 'The definition of reasonable doubt in CALCRIM No. 220 is derived from CALJIC No. 2.90 which in turn was taken directly from the language of section 1096 which, when given, requires "no further instruction . . . defining reasonable doubt. . . ."' (§ 1096a.)' [Citation.]" (*People v. Zepeda, supra*, 167 Cal.App.4th at p. 31, fn. 4.)

"Moreover, CALCRIM instructions go one step further in informing the jurors of the subjective nature of their convictions. CALCRIM No. 220's phrase, 'proof that leaves *you* with an abiding conviction that the charge is true,' unmistakably conveys

the conviction's subjective nature and the very high level of certainty required. In addition, CALCRIM No. 3550, also given to the jury by the trial court, told the jurors each 'must decide the case for yourself' and that they should not change their minds 'just because other jurors' disagree with them. There is little doubt the jury misunderstood these instructions to mean something other than the type of personal conviction [appellant] seeks to ensure." (*People v. Zepeda, supra*, 167 Cal.App.4th at p. 31.)

Appellant makes no showing that CALCRIM 220 is constitutionally inadequate, violated his due process rights, or misinstructed on proof beyond a reasonable doubt. We hold that CALCRIM 220 is constitutional, as has every other appellate court that has considered the issue. (See *People v. Campos* (2007) 156 Cal.App.4th 1228, 1238-1239; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268-1269; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1092-1093; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1119.)

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

James B. Pierce, Judge
Superior Court County of Los Angeles

David M. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

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